



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW NO. 21 OF 2019**

**IN THE MATTER OF: ARTICLE 50 (1), 165 AND 227 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26**

**AND**

**IN THE MATTER OF: SECTION 7 AND 9 (I) OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT NO. 33 OF 2015**

**AND**

**IN THE MATTER OF: AN APPLICATION BY THE KENYA PORTS AUTHORITY**

**AND THE MANAGING DIRECTOR OF THE KENYA PORTS AUTHORITY**

**(EX PARTE) FOR THE JUDICIAL REVIEW ORDER OF CERTIORARI**

**AGAINST THE DECISION OF THE PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD MADE ON 15<sup>TH</sup> APRIL 2019**

**IN RESPECT OF THE REQUEST FOR REVIEW**

**APPLICATION NO. 34 OF 2019**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**AND**

**THE MANAGING DIRECTOR,**

**KENYA PORTS AUTHORITY.....1<sup>ST</sup> EX PARTE APPLICANT**

AND

JALARAM INDUSTRIAL SUPPLIERS LIMITED.....INTERESTED PARTY

RULING

1. The Managing Director, Kenya Ports Authority and Kenya Ports Authority (the *Ex Parte* Applicants) herein by their application dated 10.5.19 (the Application) seek in the main:

**An order of Certiorari to remove to this Honorable Court and to quash the decision of the Public Procurement Administrative Review Board, the Respondent herein, made on 15<sup>th</sup> April 2019 under the Request for Review Application No. 34 of 2019 - Jalaram Industrial Suppliers Limited vs The Kenya Ports Authority & Another regarding the Tender No. KPA/031/2018-19/PSM for the Supply of Medical and Welding Gases, Welding Rods and Accessories.**

2. The background of this matter is that Jalaram Industrial Suppliers Limited, the Interested Party participated in Tender No. KPA/031/2018-19/PSM for the Supply of Medical and Welding Gases, Welding Rods and Accessories (the Tender) floated by the *Ex parte* Applicants. The Interested Party's bid was unsuccessful having failed at the technical evaluation level. *Vide* the *Ex Parte* Applicants' letter dated 4.3.19, and received on 14.3.19, the Interested Party was duly notified that its bid was unsuccessful. Being dissatisfied with the outcome, the Applicant did on 25.3.19 file a Request for Review No. 34 of 2019 against the 2<sup>nd</sup> *Ex Parte* Applicant before the Public Procurement Administrative Review Board, the Respondent. The 2<sup>nd</sup> *Ex Parte* Applicant filed its Memorandum of Response on 3.4.19 in which a Preliminary Objection (the PO) was raised. The objection was that the Request for Review was filed contrary to the express provisions of Sections 167(1) and 170(b) of the Act. In its decision of 15.4.19, the Respondent:

- a. cancelled and set aside the letters of award of the Tender issued by the *Ex Parte* Applicants to the successful bidders.
- b. directed the *Ex Parte* Applicants to reinstate the Interested Party's bid and evaluate it at the technical and financial level and complete the process within 14 days of the date of the decision.
- c. extended the tender validity period by 45 days from 8.3.19.
- d. directed each party to bear own costs.

3. Following the decision, the *Ex Parte* Applicants have moved to this Court seeking an order of certiorari that the decision of the Respondent be removed to this Court for purpose of quashing the same. The Application is premised on the grounds contained on the face of it and in the supporting affidavit of Anne Otit sworn on 14.5.19 which are summarized as follows:

- i. The Respondent acted unreasonably by *suo motu* adjourning the hearing of the Request for Review on 10.4.19 to enable Jalaram Industrial Suppliers Limited, the Interested Party seek legal advice.
- ii. The Respondent acted illegally and in breach of the mandatory provisions of Regulation 77 of the Public Procurement and Disposal Regulations 2006 by failing to dispose of the preliminary objection raised by the Applicants in the first instance.
- iii. The Respondent acted irrationally and in excess of its powers in hearing and determining an oral application for amendment of pleadings made on 11.4.19 prior to hearing and determining the Applicants' preliminary objection.
- iv. The Respondent acted *ultra vires* and in breach of Section 167 of the Public Procurement and Asset Disposal Act by admitting the Amended Request for Review after lapse of statutory timelines.
- v. The Respondent acted arbitrarily and unreasonably in directing the *Ex Parte* Applicants to readmit the Interested Party's bid to both technical and financial evaluation and to complete the evaluation within 14 days notwithstanding that the whole tender process had been concluded and tender awarded which would result in an absurdity.

4. The Application is opposed by the Interested Party by a replying affidavit sworn by Rohil Patel on 17.6.19. The Interested Party's position is that when their Request for Review came up for hearing on 10.4.19, the Respondent adjourned the hearing to 11.4.19 and directed the Interested Party to seek legal advice to deal with the points of law in the PO. The Interested Party did so and their advocate amended the Request for Review which was filed on 11.4.19. At the hearing, on 11.4.19, their advocate made an oral application for admission of the Amended Request for Review which was opposed by the *Ex Parte* Applicants. Upon considering the parties' submissions, the Respondent allowed the same and granted the *Ex Parte* Applicants time to respond to the Amended Request for Review.

5. The Amended Request for Review and the PO were both heard on 15.4.19 and the Respondent made final orders and dismissed the PO. The Respondent allowed the Amended Request for Review and directed the *Ex Parte* Applicants to re-admit the Interested Party's bid to both technical and financial evaluation process and to finalize the evaluation within 14 days from the date of the decision. According to the Interested Party, the Respondent's decision was influenced by the fact that *Ex Parte* Applicants failed to adhere to the principles of fairness in that their evaluation criteria was not applied uniformly to all bidders and that the procurement process failed to meet the tenets and principles of equity and fairness afforded to all bidders under section 3 of the Act and Article 227 of the constitution. The Interested Party further averred that the Application does not meet the requisite threshold for granting of judicial review orders.

6. The *Ex Parte* Applicants and the Interested Party filed their written submissions as directed by the Court, which I have duly considered. The Respondent did not participate in the proceedings. The *Ex Parte* Applicants fault the entire decision making process as unreasonable irrational *ultra vires* and conducted in illegality.

7. As I consider the matter, I remind myself that the judicial review Court is concerned with the lawfulness of the decision making process and not the merits of the decision which is the preserve of the appellate Court. This principle was well articulated by Mativo, J in Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Saracen Media Limited [2018] eKLR:

**There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in judicial review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects...Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.**

8. On illegality, the *Ex Parte* Applicants contend that on 10.4.19 when the Request for Review came up for hearing, the Respondent took note of the *Ex Parte* Applicants' PO. However, rather than hearing and disposing of the same, the Respondent *suo motu* adjourned the hearing to enable the Interested Party seek legal advice notwithstanding the fact that the Interested Party was ready to proceed. On 11.4.19 the Respondent failed to hear the *Ex Parte* Applicants' PO but heard and allowed the Interested Party's oral application to amend the Request for Review the sole purpose of which was to defeat the *Ex Parte* Applicants' PO. In doing so, the *Ex Parte* Applicants submit, the Respondent acted illegally and in contravention of the Public Procurement and Disposal Regulations, 2006.

9. For the Interested Party, it was submitted that the Court has the discretion to allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. As such the Respondent acted within its powers and jurisdiction by allowing the amendment to the Request for Review.

10. The Court notes that in both the Memorandum of Response dated 1.4.19 and filed on 3.4.19 and Amended Memorandum of Response dated 12.4.19 the *Ex Parte* Applicants raised the PO.

11. Regulation 77 of the Public Procurement And Disposal Regulations, 2006 provides as follows:

**(4) The Review Board shall hear the preliminary objection and make a determination whether to uphold or dismiss the same and shall record the reasons for the determination.**

**(5) If the Review Board dismisses the preliminary objection, it shall soon thereafter proceed to hear the request for review as scheduled.**

12. The procedure for dealing with a preliminary objection by the Review Board is clearly stipulated in the foregoing regulation. Once a preliminary objection is filed, the Review Board is required to consider and determine the same in the first instance, before proceeding to hear the request for review. The reasons for upholding or dismissing a preliminary objection must be recorded. If the preliminary objection is dismissed, the Review Board is required to ***proceed to hear*** the request for review. This well laid out procedure is couched in mandatory terms and there is no room for the Respondent to exercise its discretion on how to deal with a preliminary objection. In the instant case, the Respondent was required to hear the PO in the first instance, make a determination in respect thereof and then record the reasons for its finding. It was only after dismissing the PO as it did, that the Respondent could proceed to hear the Request for Review. Rather than following the stipulated procedure, the Respondent dealt with both the Request for Review and the PO simultaneously. This is against the clear procedure set out in Regulation 77. To this extent therefore, I do find that the procedure adopted by the Respondent was tainted with illegality.

13. On the issue of the Respondent acting *ultra vires*, the *Ex Parte* Applicants submitted that the Interested Party failed to enjoin the accounting officer in the Request for Review filed on 25.3.19 thus contravening the provisions of Section 170(b) and (c) of the Act. This stripped the Respondent of jurisdiction to entertain the Request for Review. The Respondent thus acted *ultra vires* when it proceeded with an oral application by the Interested Party to amend the Request for Review. For the Interested Party however, it was submitted that a party has the right to amend pleadings and Courts will normally allow amendment of pleadings at any stage of the proceedings.

14. Section 170 of the Act provides:

**The parties to a review shall be—**

- a. the person who requested the review;**
- b. the accounting officer of a procuring entity;**
- c. the tenderer notified as successful by the procuring entity; and**
- d. such other persons as the Review Board may determine.**

15. The requirement that the accounting officer and the successful tenderer to be made parties to a request for review is both statutory and mandatory. Section 170 is couched in mandatory and express terms. It was therefore not open to the Interested Party to pick and choose against which party to file the Request for Review. In the present case, the Interested Party failed to enjoin both the accounting officer of the procuring entity and the successful tenderer as required by law. The *Ex Parte* Applicants therefore raised the PO challenging this omission.

16. It is well settled that parties form an integral part of the trial process and if any mandatory party listed in Section 170 of the Act is omitted in proceedings then a request for review cannot be sustained. Failure to comply with these express provisions rendered the Request for Review filed by the Interested Party incompetent. No Court or tribunal has jurisdiction to entertain an incompetent claim brought before it.

17. In El Roba Enterprises Limited & 5 others v James Oyondi t/a Betooyo Contractors 5 others [2018] eKLR, Ogola, J. addressed the issue of the mandatory requirement of Section 170 of the Act that the accounting officer of a procuring entity be made a party. He stated as follows and I concur:

**In my view, there must be a reason as to why Parliament saw it fit to introduce the accounting officer of the procuring entity as a necessary party to the review. A keen reading of Section 170 of the Act reveals that the term “shall” is used. According to the Black’s law dictionary the term “shall” is defined as “has a duty to; more broadly, is required”. As such the provision should be read in mandatory terms that the accounting officer of a procuring entity must be a party to a review.**

18. The learned Judge went on to state:

**Parties form an integral part of the trial process and if a party is omitted that ought not to be omitted then the trial cannot be sustained. In this case, the omission of the accounting officer of the procuring entity from the applications filed before the 5th Respondent is not a procedural technicality. The Applicants (the 1st and 2nd Respondents herein) in the review applications ought to have included the accounting officer of the procuring entity in the proceedings before the 5th Respondent. The failure to do so meant that the 5th Respondent could not entertain the proceedings before it. The 5th Respondent ought to have found review applications No. 76 of 2017 and 77 of 2017 to be incompetent and dismissed the applications.**

19. This position has been affirmed in James Oyondi t/a Betooyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR where the Court of Appeal while upholding Ogola, J in the Betooyo case (supra) found that section 170 of the Act is explicit and the language compulsive. The Court stated as follows:

**It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replaced it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board’s importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.**

20. In the instant case, the Request for Review was incompetent from inception for failure to enjoin mandatory parties. An incompetent request for review is for striking out and cannot be cured by amendment. The Respondent could not exercise its powers under Section 173 of the Act in the absence of a competent Request for Review before it. By purporting to entertain an incompetent Request for Review, the Respondent acted *ultra vires* its powers. This was the holding in Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR, where Mativo, J stated:

**99. The Respondent’s wide powers under section 173 of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section 173 where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this court to invoke its Judicial Review Powers. As earlier stated, the act prescribes very rigid time frames and since the substance of the Notification was clear, the Interested Party knew at that point in time that its bid had been rejected.**

21. It is noted that the Respondent did not strike out the Request for Review proceeded to entertain the same in spite of the PO raised by the *Ex Parte* Applicants. It is further noted that the Respondent allowed the Interested Party to amend the same to include the omitted parties. The Interested Party contends that the Respondent acted within its powers and jurisdiction by allowing the amendment and that a party may at any time before judgment be allowed to amend its pleadings. I am in agreement that a party may be granted leave to amend its pleadings at any stage of the proceedings if the justice of the case requires that such leave be granted. Amendment will be allowed to bring out the true facts of a party’s case that will assist the Court to make a determination on merit. This was the holding in Institute for Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR, where Lenaola, J. (as he then was), Ngugi and Majanja, JJs. stated:

**The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.**

22. It is however well settled that the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party. In the case of Orbit Chemical Industries Ltd v National Bank of Kenya Limited [2006] eKLR, Azangalala, J. (as he then was) considered the issue of amendments of pleadings. He cited the holding of the Court of Appeal in Eastern Bakery – vs – Castelino [1958] E.A. and stated:

**The court further cited with approval the English case of Weldon – vs – Neal (6) [1887] 19 Q.B.D. 394 where it was held:**

**“The court will refuse leave to amend where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ.”**

23. Following Azangalala, J and duly guided by the Court of Appeal in the Eastern Bakery case (supra), I find that by allowing the Interested Party to amend the Request for Review to include the omitted parties, the Respondent deprived the *Ex Parte* Applicants of a defence that had accrued to them. The Respondent in effect assisted the Interested Party to steal a march over the *Ex Parte* Applicants.

24. The *Ex Parte* Applicants further contend that the amended Request for Review which was filed on 11.4.19 was a fresh application. They argue that given that the notification of the tender award was received by the Interested Party on 14.3.19, the latest date for filing the same was 28.3.19. This was countered by the Interested Party by submitting that the amended Request for Review did not introduce a new case or a new cause of action.

25. A reading of Section 170 of the Act reveals that the procuring entity is not among the parties to review stipulated therein. The Request for Review filed by the Interested Party on 25.3.19 against the procuring entity is incompetent for the reasons stated herein. In so far as the purported amendment allowed by the Respondent enjoined other parties, namely the accounting officer of the procuring entity and the successful bidder, the amended Request for Review is a fresh request for review against the new parties. The purported amended Request for Review was filed on 11.4.19 which is 14 days after the deadline for filing a request for review. The amended Request for Review was thus filed in contravention of the express provisions of Section 167(1) of the Act which provides:

**Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.**

26. From the foregoing, it is clear that the Request for Review and the amended Request for Review were both incompetent. As a result the Respondent lacked the jurisdiction to entertain the amended Request for Review which was a nullity. In the circumstances, the Court is satisfied that the Respondent acted *ultra vires* the jurisdiction conferred upon it by the Act.

27. The *Ex Parte* Applicants further argue that the decision of the Respondent directing the re-evaluation of the Interested Party’s financial bid notwithstanding that the tender had been awarded to successful bidders, would render the tendering process unreasonable and an absurdity. The Interested Party however contends that the Respondent’s finding was that the *Ex Parte* Applicants evaluation criteria was not applied uniformly to all bidders and the procurement process lacked fairness and equity required by Section 3 of the Act. To the Interested Party, the Respondent’s decision was reasonable and in conformity with its powers under Section 173 of the Act.

28. In the case of Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR, the Court of Appeal had this to say concerning the powers of the Review Board:

**The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with...**

**In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1<sup>st</sup> Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational.**

29. The Interested Party relied on the foregoing case to support the argument that the Respondent had the power to direct the reinstatement of the Interested Party’ bid for re-evaluation. This Court has already made a finding that the Respondent could only exercise its wide powers under Section 173 where there is a competent Request for Review before it. The record shows that the Respondent was well aware that the tender had been awarded successful bidders. Article 227 of the Constitution of Kenya 2010 provides:

**When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.**

30. To ensure fairness, equity, competitiveness and transparency, Section 77 of the Act provides *inter alia* that tender documents submitted manually shall be sealed in an envelope. Tender documents were opened, and the evaluation thereof done and eventually the tender was awarded to the successful bidders. The order directing the *Ex Parte* Applicants to reinstate the Interested Party’s bid re-evaluation and at the

technical and financial level after the tender has been awarded to successful bidders would deprive the process of the fairness, equity, transparency, competitiveness and cost-effectiveness stipulated in the Constitution. In the circumstances, I am satisfied that the Respondent's order is tainted with unreasonableness and would render the entire process and absurdity.

31. In the result I find that the *Ex Parte* Applicants have satisfied the required threshold for judicial review. I therefore make the following orders:

i. An Order of certiorari is hereby issued quashing the decision of the Public Procurement Administrative Review Board of 15.4.19 in Request for Review Application No. 34 of 2019 - Jalaram Industrial Suppliers Limited vs The Kenya Ports Authority & Another regarding Tender No. KPA/031/2018-19/PSM for the Supply of Medical and Welding Gases, Welding Rods and Accessories.

ii. The *Ex Parte* Applicants shall have costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 28<sup>th</sup> day of June 2019**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

.....**for the *Ex Parte* Applicants**

.....**for the Respondent**

..... **for the Interested Party**

.....**Court Assistant**